

JOSEPH LEE YOK MIN

v.

MAYBAN SECURITIES SDN BHD & ANOR

COURT OF APPEAL, PUTRAJAYA

RAUS SHARIF PCA

CLEMENT SKINNER ICA

AZAHAR MOHAMED JCA

[CIVIL APPEAL NO: S-01(IM)-555-12-2012]

27 JANUARY 2014

CIVIL PROCEDURE: Appeal - Record of appeal - Shares margin accounts incurred losses - Receiving order made against appellant - Receiver of appellant's estate appointed - Filing of proof of debt against estate - Whether debt provable debt - Whether record of appeal complete - Bankruptcy Act 1967, s. 40

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CIVIL PROCEDURE: *Locus standi - Applicant not party to originating summons - Shares margin accounts incurred losses - Receiving order made against appellant - Receiver of appellant's estate appointed - Originating summons filed at High Court - Whether decision of receiver in rejecting proof of debt ought to be reversed - Whether receiver had locus standi to appeal*

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The appellant was the alter ego of two companies, namely Lapan Jaya Enterprise Sdn Bhd ('Lapan Jaya') and Disporex Sdn Bhd ('Disporex'). Under the appellant's instructions, Lapan Jaya and Disporex opened a shares margin account with the first respondent. The appellant then gave instructions to the first respondent as to what shares to purchase and when there were contra losses, the appellant would make proposals to settle the outstanding. The account incurred a loss and subsequently, neither the appellant, Lapan Jaya and Disporex made payments to the first respondent. The first respondent claimed against the appellant, Lapan Jaya and Disporex and asserted that at all material times, the appellant was solely responsible for the losses sustained by the first respondent under Lapan Jaya and Disporex accounts. Before the trial of the claim, a receiving order ('RO') was made against the appellant resulting in the second respondent being constituted as the receiver of the appellant's estate. The first respondent then filed a proof debt ('POD') against the estate of the appellant, claiming for a total of RM18,756,868.50. The second respondent, as receiver of the appellant's estate had rejected the POD on the

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grounds that the debt was not a provable debt under s. 40 of the Bankruptcy Act 1967 ('the Act'). The first respondent then took out an originating summons at the High Court, seeking orders that the decision of the second respondent, acting as receiver of the estate of the appellant, in rejecting the plaintiff's POD be reversed; and that the Director General of Insolvency accepts and fully admits the plaintiff's claim as stated in the said POD. The High Court allowed the originating summons. In the present appeal against the said decision, the first respondent argued that the appellant had no *locus standi* to appeal and that the record of appeal was incomplete.

Held (dismissing appeal with costs)

Per Azahar Mohamed JCA delivering the judgment of the court:

- (1) The appellant was never a party to the originating summons. There were no proper applications to intervene into the proceeding whether at the High Court or Court of Appeal. (para 6)
- (2) There could be no doubt that the record of appeal was incomplete as it did not contain notes of proceedings, grounds of decision; and the sealed order. The appellant had not shown any proof that he had applied for the said items. Practice Direction No 2 of 1991 stipulated that one week after the notice of appeal was filed, the appellant had to apply to the judge's secretary to be supplied with a copy of the notes of proceeding. The non-compliance with the Practice Direction and r. 18(4)(b), (d) and (e) of the Rules of the Court Appeal 1994, where copy of the judgment was not included in the record of appeal, was not an irregularity but a nullity. (paras 7 & 8)
- (3) The debt was in fact incurred by the appellant as he was responsible for the losses incurred by the first respondent under the accounts of Lapan Jaya and Disporex. The debt was one which was present, certain and which the appellant was subject to at the date of the RO. Hence, it was a debt provable in bankruptcy under s. 40(3) of the Act. Furthermore, after the RO was entered, the appellant did not dispute to the POD filed by the first respondent. (para 11)

A **Bahasa Malaysia** *Translation Of Headnotes*

- Perayu merupakan alter ego bagi dua syarikat, iaitu Lapan Jaya Enterprise Sdn Bhd ('Lapan Jaya') dan Disporex Sdn Bhd ('Disporex'). Atas arahan perayu, Lapan Jaya dan Disporex
- B membuka akaun saham margin dengan responden pertama. Perayu memberikan arahan kepada responden pertama tentang saham-saham yang harus dibeli dan di mana terdapat kerugian kontra, perayu akan membuat cadangan untuk menyelesaikan yang mana yang belum diselesaikan. Akaun mengalami kerugian dan kemudian,
- C perayu, Lapan Jaya mahupun Disporex tidak membuat bayaran kepada responden pertama. Responden pertama menuntut daripada perayu, Lapan Jaya dan Disporex dan menghujahkan bahawa pada setiap masa material, perayu bertanggung sepenuhnya bagi kerugian yang dialami oleh responden pertama di bawah akaun-akaun Lapan Jaya dan Disporex. Sebelum
- D perbicaraan tuntutan tersebut, satu perintah penerimaan ('PP') dibuat terhadap perayu, mengakibatkan responden kedua dijadikan penerima estet perayu. Responden pertama seterusnya memfailkan bukti keberhutangan ('BK') terhadap estet perayu, dengan
- E menuntut sejumlah RM18,756,868.50. Responden kedua, sebagai penerima estet perayu telah menolak BK atas alasan bahawa hutang tersebut bukanlah hutang yang boleh dibuktikan di bawah s. 40 Akta Kebankrapan 1967 ('Akta'). Responden pertama kemudian memulakan saman pemula di Mahkamah Tinggi,
- F memohon perintah-perintah bahawa keputusan responden kedua, yang bertindak sebagai penerima estet perayu, dalam menolak BK plaintif di atas; dan bahawa Ketua Pengarah Insolvensi menerima dan mengakui sepenuhnya tuntutan plaintif seperti yang dinyatakan dalam BK. Mahkamah Tinggi membenarkan saman pemula. Dalam
- G rayuan terhadap keputusan tersebut, responden pertama menghujahkan bahawa perayu tidak mempunyai *locus standi* untuk merayu dan bahawa rekod rayuan tidak lengkap.

Diputuskan (menolak rayuan dengan kos)

H **Oleh Azahar Mohamed HMR menyampaikan penghakiman mahkamah:**

- (1) Perayu tidak pernah menjadi pihak kepada saman pemula. Tiada permohonan sewajarnya yang dibuat untuk mencelah prosiding tersebut sama ada di Mahkamah Tinggi mahupun
- I Mahkamah Rayuan.

- (2) Tiada keraguan bahawa rekod rayuan tidak lengkap kerana ia tidak mengandungi nota prosiding; alasan penghakiman dan perintah yang dimeterai. Perayu tidak menunjukkan sebarang bukti bahawa ia telah memohon item-item tersebut. Arahan Amalan No 2 1991 menyatakan bahawa seminggu selepas notis rayuan difailkan, perayu hendaklah memohon kepada setiausaha hakim agar diberikan sesalinan nota prosiding. Ketidakpatuhan Arahan Amalan dan k. 18(4)(b), (d) dan (e) Kaedah-kaedah Mahkamah Rayuan 1954, yang mana salinan penghakiman tidak disertakan dalam rekod rayuan, bukanlah satu salah aturan tetapi satu pembatalan. A B C
- (3) Hutang tersebut sememangnya diakibatkan oleh perayu kerana dia bertanggungjawab bagi kerugian terhadap responden pertama di bawah akaun-akaun Lapan Jaya dan Disporex. Hutang tersebut wujud, pasti dan yang mana perayu tertakluk kepada tarikh PP. Dengan itu, ia adalah hutang yang boleh dibuktikan dalam kebangkrapan di bawah s. 40(3) Akta. Selanjutnya, selepas PP dimasukkan, perayu tidak menafikan BK yang difailkan oleh responden pertama. D

Case(s) referred to: E

Capital Insurance Bhd v. Kasim Mohd Ali [2000] 1 CLJ 269 CA (*refd*)
Chuah Tim Lan v. RHB Bank Bhd & Anor [2008] 6 CLJ 500 CA (*refd*)
Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 CA (*refd*)

Legislation referred to: F

Bankruptcy Act 1967, s. 40(3)
 Courts of Judicature Act 1964, s. 42(1)
 Rules of the Court of Appeal 1994, r. 18(4)(b), (d), (e)

For the appellant - Rim Lee; M/s J Ambrose & Partners

For the 1st respondent - Christopher KH Chong; M/s Lind Willie Wong & Chin G

For the estate of 2nd respondent - Director General of Insolvency, Kota Kinabalu Branch

[Appeal from High Court of Sabah & Sarawak, Kota Kinabalu; Originating Summons No: 24-17-2005] H

Reported by Najib Tamby

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A JUDGMENT

Azahar Mohamed JCA:

B [1] This was an appeal by the appellant, Joseph Lee Yok Min @ Ambrose against the decision of the learned High Court Judge who had allowed the first respondent's originating summons for the following orders against the second respondent:

C (a) that the decision of the Director General of Insolvency, acting as receiver of the estate of Joseph Ambrose Lee, in rejecting the plaintiff's proof of debt dated 10 February 2003 in the sum of RM18,756,868.50 be reversed; and

(b) that the Director General of Insolvency accepts and fully admits the plaintiff's claim as stated in the said proof of debt.

D [2] We heard the appeal, wherein at its conclusion we unanimously dismissed it with costs in the sum of RM10,000. We now give our reasons for so deciding.

E [3] The brief antecedent facts of the case giving rise to this appeal can be gleaned from the unopposed first respondent's affidavit-in-support of its originating summons (see record of appeal, Part B pp. 1-14). The appellant was the alter ego of two companies, namely, Lapan Jaya Enterprise Sdn Bhd ("Lapan Jaya") and Disporex Sdn Bhd ("Disporex"). Under the instructions of the appellant, Lapan Jaya and Disporex opened a shares margin account with the first respondent. The appellant provided the collateral and was also the beneficiary of the contra gains from the share trading. The appellant also gave instructions to the first respondent as to what shares to purchase and when there are contra loses, the appellant will make proposals to settle the outstanding. The account incurred a loss and subsequently, neither the appellant, Lapan Jaya or Disporex made payments to the first respondent. The first respondent therefore instituted a civil claim against the appellant, Lapan Jaya and Disporex at the Kuala Lumpur High Court *via* Civil Suit No: D1-22-879-1998. The civil action is based on the first respondent's assertion that at all material times, the appellant is solely responsible for the losses sustained by the first respondent under Lapan Jaya and Disporex's accounts.

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[4] Before the trial of the suit, a receiving order (“RO”) was made on 22 May 2001 against the appellant resulting in the second respondent being constituted as the receiver of the appellant’s estate. Pursuant to the RO, the first respondent filed a proof of debt (“POD”) on 21 February 2003 against the estate of the appellant claiming a total amount of RM18,756,868.50. The second respondent, as receiver of the appellant’s estate had on 1 February 2005 rejected the POD on the grounds that the debt is not a provable debt under s. 40 of the Bankruptcy Act 1967 (“the Act”). Consequently, the first respondent took out the originating summons herein, which is the subject matter of the present appeal. As we have indicated earlier, the learned High Court Judge allowed the first respondent’s originating summons.

[5] Before us, learned counsel for the first respondent raised two preliminary objections. First, the appellant has no *locus standi* to appeal and secondly, the record of appeal is incomplete.

[6] On the issue of *locus standi*, we found there is merit in the arguments of learned counsel for the first respondent. The point to be made here is that the appellant was never a party to the originating summons before the learned High Court Judge. There were so no proper applications to intervene into the proceedings whether at the High Court or the Court of Appeal.

[7] On the second issue, there can be no doubt that the record of appeal is incomplete as it does not contain:

- (i) notes of proceedings;
- (ii) grounds of decision; and
- (iii) sealed order dated 12 January 2006.

[8] The appellant has not shown any proof that he had applied for the three items above. According to Practice Direction No: 2 of 1991, one week after the notice of appeal is filed, the appellant has to apply to the judge’s secretary to be supplied with a copy of the notes of proceedings. In the circumstances, in our judgment, the non-compliance with the practice direction and r. 18(4)(b), (d) and (e) of the Rules of the Court of Appeal 1994, where copy of the judgment appealed from, notes of proceedings and grounds of judgment was not included in the record of appeal, was not an irregularity but a nullity (see: *Chuah Tim Lan v. RHB Bank Bhd & Anor* [2008] 6 CLJ 500 and *Capital Insurance Bhd v. Kasim Mohd Ali* [2000] 1 CLJ 269).

A [9] For reasons aforesaid, the first respondent's preliminary objection was upheld. We held that the record of appeal is defective; it tantamount to no record of appeal having being filed. On this ground alone this appeal must be dismissed with costs.

B [10] But even having said this procedural fatal flaw, we found the appeal lacked merit. It was argued by learned counsel for the appellant that that the second respondent's decision to reject the POD was correct and should not have been overturned by the learned High Court Judge. Learned counsel argued that the
C appellant was not the borrower of the loan nor the guarantor of Lapan Jaya and Disporex and that there was no final judgment in favour of the first respondent.

[11] On the facts of the present case, we do not agree with the contention of learned counsel for the appellant. Now, s. 40(3) of
D the Act, with the necessary emphasis, states:

Save as provided in sub-sections (1) and (2) all debts and liabilities present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may
E become subject before his discharge by reason of any obligation incurred, before the date of the receiving order shall be deemed to be debts provable in bankruptcy.

In our judgment based on the first respondent's affidavit-in-support and the exhibits therein, which remains unrebutted and is
F therefore deemed admitted, the debt amounting RM18,756,868.50 in this case was in fact incurred by the appellant (see: *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609; [1995] 1 AMR 631). As we have emphasised earlier, the undisputed fact is that the appellant was the alter ego of Lapan Jaya and Disporex.
G The appellant instructed both the companies to open a shares margin account with the first respondent and provided the required collateral. The appellant gave instructions to the first respondent as to what shares to purchase. The appellant was the beneficiary of the contra gains from the share trading and when there were
H contra losses, the appellant would make proposals to settle the outstanding. The appellant was therefore responsible for the losses amounting RM18,756,868.50 incurred by the first respondent under the accounts of Lapan Jaya and Disporex. In our judgment, the debt is clearly one which is present, certain and which the
I appellant is subject to at the date of the RO. Hence, it is a debt provable in bankruptcy under s. 40(3) of the Act.

[12] Even more, after the RO was entered, the appellant did not dispute to the POD filed by the first respondent or its representative presence during the first creditors' meeting. The first creditors' meeting was held on the 24 June 2004. The first respondent's representative was present as can be confirmed by the minutes of meeting. The appellant and his counsel was at the said meeting and if the appellant was not indebted to the first respondent, he would naturally have indicated this at the meeting. Neither the appellant nor his counsel queried the amount of RM8,756,868.90 stated in the POD.

[13] In the result, we had unanimously dismissed this appeal with costs in the sum of RM10,000 to the first and second respondents. We ordered that the deposit to be refunded to the appellant.

[14] This judgment is prepared pursuant to s. 42(1) of the Courts of Judicature Act 1964 as our learned brother Clement Allan Skinner, JCA has since retired.

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